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NO. 56335-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

RAY SAUNDERS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 00-1-01209-0

BRIEF OF RESPONDENT

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I. INTRODUCTION

Over twenty years ago, a jury found Ray Saunders guilty of first degree murder, kidnapping, rape, and robbery after he brutally raped and murdered a woman who had stopped to help Saunders' co-defendant with her broken down vehicle. His convictions were affirmed on direct appeal. In 2021, the Washington Supreme Court remanded the matter to the trial court to vacate the rape conviction due to merger and for resentencing.

Resentencing occurred while the world was still grappling with the Covid-19 pandemic. Saunders sent a letter to the court inquiring about his resentencing hearing and advising that he was 88 years old, confined to a wheelchair, and dying of cancer. The parties, both defense and the State, thereafter agreed that Saunders should appear remotely for the resentencing hearing and advised the trial court of the same. The court scheduled the matter for a Zoom hearing.

At resentencing, Saunders appeared remotely from the Department of Corrections, via Zoom. His attorney also appeared remotely via Zoom. Saunders did not object to his remote appearance. The court imposed sentence and provided Saunders with the opportunity to speak privately with his attorney by way of a Zoom breakout room. He did not object to this procedure.

For the first time on appeal, Saunders claims the trial court violated his right to be present at the resentencing hearing, violated his right to privately communicate with counsel, and failed to conduct an individualized inquiry into the necessity of him appearing from prison and thus in “restraints.” This Court should decline to consider his claims, because he fails to show manifest constitutional error under RAP 2.5(a)(3). Saunders’ claims also fail on the merits, because his remote appearance was by agreement of the parties and thus authorized under CrR 3.4(e), he was given the opportunity to privately confer with counsel and did so, and a remote appearance from prison, without more, is

not equivalent to appearing in restraints. This Court should affirm.

II. RESTATEMENT OF THE ISSUES

- A. Whether this Court should decline to consider Saunders' claims of error which are all being raised for the first time on appeal, where he fails to show manifest constitutional error under RAP 2.5(a)(3)?
- B. Whether Saunders' right to be present at the resentencing hearing was violated, where the parties agreed to Saunders' remote appearance due to his poor health?
- C. Whether Saunders' right to confer with counsel was violated, where the court provided Saunders and his attorney the opportunity to speak privately during the resentencing hearing via a Zoom breakout room?
- D. Whether Saunders' remote appearance from prison was the same as appearing in "restraints" such that an individualized inquiry of necessity was required, where the record gives no indication as to Saunders' physical appearance or surroundings on camera, and where the Supreme Court's decision in *Jackson* does not support Saunders' position?

III. STATEMENT OF THE CASE

In 2001, a jury found appellant Ray Saunders guilty of first degree murder, first degree kidnapping, first degree rape, and first degree robbery. CP 16-17, 37. The murder, rape, and

kidnapping convictions also included deadly weapon enhancements. CP 16-17. The trial court imposed an exceptional sentence of 822 months based on victim vulnerability and gratuitous cruelty. CP 19, 23, 37. Saunders' convictions were affirmed on direct appeal, but the case was remanded for resentencing due to ineffective assistance of counsel. CP 34, 57. Resentencing was held in December 2004. CP 62-74. The court imposed the high end of the standard range for a total of 651 months. CP 65, 67, 75-76.

In February 2020, Saunders filed a CrR 7.8 motion for relief from sentence in Pierce County Superior Court. CP 77-83. His motion was eventually transferred to the Washington State Supreme Court as a personal restraint petition, and the Court accepted the State's concession that Saunders' rape and murder convictions merged. CP 89-90. The case was remanded to the superior court to vacate the rape conviction and for resentencing. CP 90. The certificate of finality was issued in March of 2021. CP 87.

On August 9, 2021, Saunders filed a letter with the Pierce County Superior Court requesting movement on his resentencing hearing. CP 128. In his letter, he stated, “I am an 88 year old that is confined to a wheelchair and dying of cancer,” and he asked to be “resentenced before I die.” CP 128.

During this time, the court system was still impacted by the Covid-19 pandemic. The Washington State Supreme Court permitted the significant alteration of standard criminal procedures to prevent the unmitigated spread of Covid-19 to litigants, court staff, and defendants and encouraged the use of remote proceedings when appropriate.¹

Consistent with these concerns, and in response to Saunders’ letter, the State emailed the court to request a

¹ The Washington Supreme Court’s Fifth Revised and Extended Order Regarding Court Operations was in effect at that time. *See* Fifth Revised and Extended Order Regarding Court Operations, No. 25700-B-658 (February 19, 2021), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf>.

resentencing hearing. CP 193-194, 209-210. Saunders' attorney was included on this email to the court. CP 129, 209-210. The email from the deputy prosecutor stated, in relevant part, "I've been tasked with getting a hearing set up for this defendant who is currently in DOC. The Supreme Court has filed a remand for re-sentencing. The defendant is in ill health apparently so I would request that this hearing be done via Zoom. Defense agrees." CP 210. In response to this email, the court set the matter for resentencing on August 27, 2021, via Zoom. CP 131, 209. The State subsequently sent a Virtual Hearing Request form to the Department of Corrections for the August 27th resentencing hearing. CP 211-213.

Resentencing was held on August 27, 2021. CP 91-107. Saunders and his attorney, Mary Kay High, both appeared remotely via Zoom. CP 104; 8/27/21 RP 4. Saunders appeared from the Department of Corrections. CP 133; 8/27/21 RP 4, 27. During the hearing, Saunders never objected to his remote

appearance or indicated he wished to be physically present in the courtroom.

The court vacated Saunders' rape conviction and imposed the high end of the standard range on each count, with the murder and kidnapping convictions to run consecutive to one another, for a total of 504 months in the Department of Corrections. CP 93-99; 8/27/21 RP 16-18. After the court imposed its sentence, Saunders indicated he wanted to speak with his attorney privately in a breakout room. 8/27/21 RP 24. The court granted him that opportunity, and Saunders and his attorney conferred privately. CP 133; 8/27/21 RP 24, 26-27.

Saunders thereafter filed the instant appeal, claiming (1) the court deprived him of his right to be physically present at resentencing, where he appeared via Zoom without his agreement, (2) the court deprived him of his right to privately confer with counsel, and (3) the court failed to consider the necessity of him appearing from prison, which is equivalent to appearing in restraints. The State's response follows.

IV. ARGUMENT

A. Saunders' Right To Be Present at His Resentencing Hearing Was Not Violated, Because the Parties Agreed To His Remote Appearance.

For the first time on appeal, Saunders claims he was denied his right to be [physically] present at the resentencing hearing. He did not object to his remote appearance below. Saunders fails to show he can raise this claim for the first time on appeal under RAP 2.5(a)(3), and this Court should decline to consider it. However, even if his claim were considered, it would fail, because Saunders appeared remotely by agreement of the parties due to his health, and his remote appearance was authorized by CrR 3.4(e). This Court should affirm.

1. Saunders fails to show he can raise this claim for the first time on appeal under RAP 2.5(a)(3).

“The general rule is that appellate courts will not consider issues raised for the first time on appeal.” *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)). However, RAP 2.5(a)(3) allows an appellant to raise for the first time “manifest error affecting a constitutional right.” The

appellant has the burden of showing “(1) the error is manifest, and (2) the error is truly of constitutional dimension.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). *See State v. Anderson*, 19 Wn. App. 2d 556, 561-62, 497 P.3d 880 (2021), *review denied*, 199 Wn.2d 1004 (2022) (applying RAP 2.5(a)(3) to defendant’s claim of right to be present at resentencing).

“Manifest error” requires a showing of actual and identifiable prejudice to the defendant’s constitutional rights. *See Kirkman*, 159 Wn.2d at 926-27; *O’Hara*, 167 Wn.2d at 98-99. “[T]he focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wn.2d at 99-100.

“Criminally accused persons have a constitutional right to be present at all critical stages of court proceedings; however, this right is one that can be waived by failure to object.” *Anderson*, 19 Wn. App. 2d at 561 (citing *State v. Jones*, 185 Wn.2d 412, 426, 372 P.3d 755 (2016); *State v. Sublett*, 176 Wn.2d 58, 124-25, 292 P.3d 715 (2012) (Madsen, C.J.,

concurring)). In *Anderson*, the court held that the defendant waived any claim that his virtual resentencing hearing deprived him of his right to be present by failing to object below. *Id.* at 561-62. The court noted that “a defendant may waive an in-person court appearance for strategic reasons, such as health concerns.” *Id.* at 561. As a result, “[a] trial court is not required to probe into the issue of whether the defendant is voluntarily waiving the right to presence if no objection is made.” *Id.*

In this case, Saunders *did* waive his physical appearance in court due to health concerns. *See* CP 128, 209-210. Based on the parties’ representations to the court, the court was not required to further probe into whether Saunders voluntarily waived his right to be physically present at the resentencing hearing given his failure to object. *See Anderson*, 19 Wn. App. 2d at 561.

Saunders cannot show actual prejudice in light of the parties' agreement that resentencing be held via Zoom.² The alleged error is not "so obvious on the record" that it warrants appellate review. *O'Hara*, 167 Wn.2d at 99-100. Just as in *Anderson*, to the extent the virtual hearing process implicated Saunders' right to be present, this issue has been waived, and the Court should decline to consider it.

2. Saunders appeared remotely at resentencing by agreement of the parties pursuant to CrR 3.4(e).

Even if this Court were to consider Saunders' newly raised issue, the record shows that his remote appearance was by agreement of the parties and therefore authorized by court rule.

"As a matter of due process, '[a] criminal defendant has a fundamental right to be present at all critical stages of a trial.'" *Jones*, 185 Wn.2d at 426 (quoting *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011)). This includes the right to be present

² Saunders does not cite RAP 2.5(a)(3) in his brief, nor does he discuss how he was prejudiced by his remote appearance. He thus fails to meet his burden to show manifest constitutional error under RAP 2.5(a)(3).

at sentencing and resentencing. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). Saunders appeared remotely at his resentencing hearing. *See* 8/27/21 RP 4-5. The question is whether his remote appearance was authorized.

CrR 3.4(b) provides that “[t]he defendant shall be present physically or remotely (in the court’s discretion)...at the imposition of sentence, except as otherwise provided by these rules[.]” CrR 3.4(e) allows for trial court proceedings, such as sentencing hearings, to be conducted by video conference if “by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.”

Here, CrR 3.4(b) required Saunders’ physical or remote appearance at his resentencing hearing, and CrR 3.4(e) authorized the hearing to be conducted by video conference because it was by “agreement of the parties.” The State communicated with the court, in writing by email, and requested a resentencing hearing via Zoom due to Saunders’ “ill health.”

CP 210. This email indicated that defense was in agreement with the Zoom format, and Saunders' attorney was included in the email. CP 209-210. The court granted the parties' request and scheduled the matter for a Zoom hearing on August 27, 2021. CP 131, 209.

Because Saunders appeared remotely at his resentencing by agreement of the parties, his right to be present was not violated. This Court should therefore affirm.

B. Saunders Was Afforded the Opportunity To Privately Confer With Counsel and Did So.

Also for the first time on appeal, Saunders claims he was denied his right to confidentially communicate with counsel during the resentencing hearing. He again fails to show manifest constitutional error under RAP 2.5(a)(3). The issue is waived. And regardless, the trial court afforded Saunders the opportunity to confer privately with his attorney by way of a Zoom breakout room. This Court should affirm.

1. Saunders again fails to show he can raise this claim for the first time on appeal under RAP 2.5(a)(3).

“[D]eprivation of the right to counsel is a fundamental constitutional claim that can be raised for the first time on appeal, *so long as the claim is manifest*, as required by RAP 2.5(a)(3).” *Anderson*, 19 Wn. App. 2d at 562 (emphasis added). Again, Saunders fails to show any error is manifest in his case. “Manifest error” requires a showing of actual and identifiable prejudice, which Saunders cannot show, because he was afforded the opportunity to privately confer with his attorney and did so. *See* CP 133; 8/27/21 RP 24, 26-27.

This distinguishes Saunders’ case from *Anderson*, where the court found manifest constitutional error despite the defendant’s failure to object. *See Anderson*, 19 Wn. App. 2d at 562-63. In *Anderson*, the defendant appeared at his resentencing hearing via video, whereas his attorney appeared telephonically. *Id.* at 560. The record gave no indication as to whether the defendant and his attorney were able to communicate with one

another throughout the hearing, the trial court never set any ground rules for their communication, and given their separate locations, “it [was] not apparent how private attorney-client communication could have taken place.” *Id.* at 560, 563.

For the first time on appeal, the defendant argued the videoconference hearing deprived him of his constitutional right to confer with counsel. *Id.* at 561. The court found that the defendant had established manifest constitutional error under RAP 2.5(a)(3), but that the error was harmless. *Id.* at 563-65.

Here, on the other hand, the record *does* indicate that Saunders and his attorney were able to communicate privately during the hearing by utilizing a breakout room. There was a system in place which allowed for their confidential communications, and they used it. Saunders therefore cannot show manifest constitutional error. The issue is waived, and this Court should decline to consider it.

2. Saunders conferred in private with his attorney.

A criminal defendant has a constitutional right to assistance of counsel, including the opportunity for private and continual discussions with counsel during all critical stages of the proceedings. *State v. Fuentes*, 179 Wn.2d 808, 811, 318 P.3d 257 (2014); *State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981); *Anderson*, 19 Wn. App. 2d at 562. “The ability for attorneys and clients to consult privately need not be seamless, but it must be meaningful.” *Anderson*, 19 Wn. App. 2d at 562. Whether a defendant’s constitutional right to privately confer with counsel was violated depends on the specific facts of the defendant’s case. *See State v. Gonzales-Morales*, 138 Wn.2d 374, 376-78, 386, 979 P.2d 826 (1999). Alleged constitutional violations are generally reviewed de novo. *State v. Jackson*, 195 Wn.2d 841, 850, 467 P.3d 97 (2020).

Saunders’ constitutional right to privately confer with counsel was not violated. On this point, the Washington Supreme Court’s decision in *Gonzales-Morales* is persuasive. In that case,

the defendant's primary language was Spanish and he required the use of a certified Spanish language interpreter at trial. *Gonzales-Morales*, 138 Wn.2d at 376. One of the State's witnesses also required the use of a Spanish language interpreter in order to translate their testimony from Spanish to English. *Id.* The trial court allowed the State's witness to use the defendant's appointed interpreter, provided the interpreter remained seated at the defense table. *Id.* at 377. The court advised the defendant that if he "wanted to ask counsel a question he could alert the court and testimony of the Spanish language witness would be interrupted in order for the interpreter to assist him." *Id.* The defendant never requested the opportunity to communicate with his attorney during the witness' testimony. *Id.* at 378.

On appeal, the defendant claimed the witness' use of his interpreter prevented him from communicating with his attorney during trial. *Id.* at 382. Our Supreme Court determined that the defendant's constitutional right to counsel was not violated. *Id.* at 375, 386. The trial court had offered the defendant the "option

of interrupting the testimony to permit him to communicate with his counsel with the use of the interpreter,” but the defendant “did not exercise the option.”³ *Id.* at 386.

In this case, the court offered Saunders the option of communicating with his attorney in private through the use of a breakout room, and Saunders chose to exercise that option. 8/27/21 RP 24, 26-27. He was afforded the opportunity to privately confer with his attorney and did so. Saunders’ constitutional right to counsel was therefore not violated, and this Court should affirm.

C. Saunders’ Remote Appearance From Prison Is Not Equivalent to Appearing in Shackles or Restraints.

Saunders contends his remote appearance from prison was the same as appearing in “restraints,” and the court was therefore required to make a finding of necessity, which it failed to do. Again, this claim is being raised for the first time on appeal.

³ The Court noted the defendant “could have motioned to his counsel to ask the trial court to interrupt the testimony to allow him to communicate with his counsel through the interpreter.” *Id.* at 386.

His claim is waived under RAP 2.5(a)(3). First, Saunders fails to present a constitutional issue. “A defendant cannot simply assert that an error occurred at trial and label the error “constitutional”; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affects his rights at trial.” *State v. Grimes*, 165 Wn. App. 172, 186, 267 P.3d 454 (2011). Appellate courts look to the asserted claim and determine, if the claim is correct, whether it implicates a constitutional interest as opposed to some other form of trial error. *Id.* As argued below, appearing remotely from prison is not equivalent to appearing in shackles or restraints. Saunders’ constitutional right to appear in court free from restraints is not implicated.

Second, Saunders fails to show manifest error. Saunders appeared remotely from prison by agreement of the parties. He cannot show actual prejudice, because defense agreed that

Saunders' poor health necessitated his remote appearance.⁴ Saunders has not shown manifest constitutional error under RAP 2.5(a)(3), and thus this Court should decline to consider his claim.

Further, Saunders' claim is without merit. The federal and state constitutions provide a defendant the right to appear in court free of shackles or other restraints, absent extraordinary circumstances. U.S. Const. amend. VI, XIV; Const. art. I, § 22; *State v. Jackson*, 195 Wn.2d 841, 852, 467 P.3d 97 (2020); *see also Deck v. Missouri*, 544 U.S. 622, 632, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) (“[D]ue process does not permit the use of visible restraints if the trial court has not taken account of the

⁴ Moreover, there is no indication in the record that Saunders appeared at his resentencing in shackles or other form of physical restraints. Nor does the record contain any images of the videoconference room or Saunders' appearance on camera. There is no evidence that, aside from the court's knowledge of Saunders' physical location, there was any visible indication of his “in-custody” status. *See O'Hara*, 167 Wn.2d at 99 (an error cannot be manifest if the facts necessary to decide the claimed error are not in the record on appeal).

circumstances of the particular case.”). This right extends to “all stages of the proceedings,” including sentencing. *Jackson*, 195 Wn.2d at 845.

However, “the right to be free from restraint is not absolute, and trial court judges are vested with the discretion to determine measures that implicate courtroom security, including whether to restrain a defendant in some capacity in order to prevent injury.” *Jackson*, 195 Wn.2d at 852. A court has discretion to require restraints but must first conduct an individualized inquiry into whether shackling a defendant is necessary. *Jackson*, 195 Wn.2d at 852-54. A trial court abuses its discretion and commits constitutional error by failing to conduct such an inquiry. *Id.* at 854-55.

Saunders provides no authority to support his position that a defendant’s remote appearance from prison, without more, is akin to appearing in restraints, and nothing in the Supreme Court’s recent decision in *Jackson* suggests in-custody video conferences were intended to fall within the scope of the court’s

ruling. In *Jackson*, the court discussed the history of shackling and focused on the “binding of the prisoner in irons” and the guarantee to be “free from restraints.” *Id.* at 850-51. The court noted that “[s]hackles and restraints” were associated with the transatlantic slave trade and were used as a means of “control and oppression” in American history. *Id.* at 851. Videoconference proceedings from prison, without more, do not hold the same association. Moreover, the court in *Jackson* cited concern over “cases...where courts are systematically using restraints on all incarcerated defendants.” *Id.* Notably, the court did not find that “restraints” and “incarceration” are one in the same. In a recent unpublished opinion, Division I came to a similar conclusion. *See State v. Williams*, No. 82803-7-I, 2022 WL 2115256 (Wash. Ct. App. June 13, 2022) (unpublished) (“We decline to read *Jackson* for the broad proposition that any videoconference appearance from prison violates the defendant's constitutional rights.”).

Saunders' remote appearance from the Department of Corrections for his resentencing hearing, which was by agreement of the parties in light of his poor health, was not equivalent to appearing in shackles or restraints. His claim of constitutional error thus fails, and this Court should affirm.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Saunders' sentence.

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RESPECTFULLY SUBMITTED this 9th day of
February, 2023

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